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Supreme Court, U.S.
FILED

No. 02 771 MAY 20 2002

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In The

Supreme Court of the United States

JEAN A.R. ADAMS-SOW, M.D. *Petitioner*

v.

THE MEDICAL COLLEGE OF HAMPTON ROADS/

EASTERN VIRGINIA MEDICAL SCHOOL, et al.,

Respondents

ON PETITION FOR *WRIT* OF *CERTIORARI*

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETITION FOR *WRIT OF CERTIORARI*

Jean A.R. Adams-Sow, M.D.
2750 Fish Road
Emporia, Virginia 23847

(704)965-5562

Petitioner

45 pp

QUESTIONS PRESENTED

1. whether or not the record contains evidence which, when viewed in the light most favorable to plaintiff, established a material fact as to whether the Medical College of Hampton Roads (MCHR), by and through its agents, eavesdropped on the plaintiff's personal telephone conversations; and if so,

2. Whether such evidence would be admissible at trial, and if so,

3. Whether eavesdropping can only occur outside the scope of employment, a holding espoused by the trial court.

PARTIES TO THE PROCEEDING

JEAN A.R. ADAMS-SOW, M.D.
Plaintiff/Petitioner

v.

THE MEDICAL COLLEGE OF HAMPTON ROADS/EASTERN VIRGINIA MEDICAL SCHOOL, et al.,
Respondents

TABLE OF CONTENTS

AUTHORITIES. iv

OPINIONS BELOW 1

JURISDICTION. 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION. . . 8

CONCLUSION. 15

AUTHORITIES

Abel v. Bonfanti, 625 F. Supp. 263 (S.D. N.Y. 1985). 12

Awbrey v. Great Atlantic & Pac. Tea Col, Inc., 505F.Supp.604. . . . . .13, 15

Campiti v. Walonis, 611 F. 2d 387 (1st Cir. 1979). 12

Deal v. Spears, 980 F.2d 1153 (8th Cir. 1992). 11

Gerard v. Blackman, 401 F. Supp 1189 (N.D. III. 1975). 12

Motor Club of America Ins. Co. v. Hanifi, 145 F. 3d 170 (4th Cir. 1998). 11

Thalhimer Bros. v. Shaw 159 S.E. 87 Va. 1931). 10

United States v. Harpel, 493F.2d 346 (10th Cir. 1974). 12

Watkins v. L.M. Berry & Co., 704 F.2d
577 (11th Cir. 1983). 11

18 U.S.C. Section 2511 (1)(a). 1,2,8

18 U.S.C. Section 2520 1,8

28 U.S.C. Section 1331 1

OPINIONS BELOW

There were no written opinions set forth by the 4th Circuit Court of Appeal. The opinions are unpublished.

JURISDICTION

I, the Appellant/Petitioner, Jean A.R. Adams-Sow, M.D. ("Plaintiff" or "Sow") filed this action against Defendants Eastern Virginia Medical School/Medical College of Hampton Roads ("Defendant" or "MCHR") and Douglas Kleeman, M.D. ("Defendant" or "Kleeman). The sole count surviving Defendants' 12(b)(6) motion arises under 18 U.S.C. Section 2511(1)(a) and 2520, the criminal eavesdropping/wiretapping statue and concomitant civil remedy provision. Hence, the trial court possessed subject matter jurisdiction pursuant to 28 U.S.C. Section 1331. This appeal follows the trial court's grant of summary judgment and the 4th Circuit of Appeals affirmation of that judgment—without and opinion be set forth by the 4th Circuit Court of Appeals. Accordingly, the U.S. Supreme Court possess appellate jurisdiction over this appeal.

CONSTITUTIONAL AND STATORY PROVISIONS

Criminal Eavesdropping/wiretapping statue and concomitant civil remedy provision: 18 U.S.C. section 2511(1)(a) and 2520.

STATEMENT OF THE CASE

I, Petitioner Jean A.R. Adams-Sow, M.D., initially filed *pro se* Complaint against the MCHR, Kleeman and the "other senior doctors/residents", averring myriad claims. The majority of my claims were extinguished via Defendants' Motion pursuant to Rule 12(b)(6) of the Federal Rule of Civil Procedure. The sole Count surviving is the aforesaid 12(b)(6) motion claimed intentional eavesdropping/wiretapping and according to the Court, arose under 18 U.S.C. section 2511(1)(a). Counsel assisted me in the prosecution of that claim.

Ensuring discovery, Defendants were heard orally on their summary judgment motion on April 26, 2001. After reviewing the briefs of the parties and weighing the arguments presented orally, the Court, ruling from the bench, concluded that there did not exist material question of fact in dispute, granting Defendants' Motion for Summary Judgment. The Court then issued an opinion and Order memorializing the same on June 11, 2001. Plaintiff noted an appeal on July 10, 2001.

I now appeal to the U.S. Supreme Court *pro se*, as my Counsel in not certified to practice law at the level of the Supreme Court. The 4th Circuit Court of Appeals affirmed the decision of the District Court without publishing an opinion as to why the decision was made.

This case arose from my employment as a Resident at the MCHR following graduation from The Ohio State University College of Medicine, a position I accepted in the Spring of 1997. Orientation commenced in July of 1997 and the program was substantively in progress within a month therefrom. My involvement with the MCHR during those early months was unremarkable; it did not augur the turmoil and distress to which I was soon to be saddled. Personal matters consumed my life during the month of September 1997[1], mandating my excused absence from the residency program; I resumed participation in October of 1997. Until this point in time, I was progressing nicely within the program.

[1]Specifically, my father was hospitalized at MCV due to illness, dying during latter part of that month.

The month of October 1997 marks the incipience of the activities at issue which ultimately truncated my professional career and wherefrom my past, present and future emotion and psychological maladies sprung. The Senior Residents began using a "snoop phone" to listen to my personal telephone conversations.[2] Although I remember hearing a strange "clicking" sound when using the telephone in question, I presumed it to be intrinsic to the phone I was using.[3] I eventually learned of the eavesdropping following a certain event in October. During a telephone conversation with my husband, where the "clicking" had persisted, I heard a beeper go off. Dr. Sherri Marshall, after some time passed, admitted being on the line in the senior call-room. During this conversation, I had sharply criticized the residency program, its implementers and, in particular, the "Senior" residents charged to oversee my progress. For example, I referred to senior resident Dr. Sherri Marshall as a "lazy ass bitch", among other things.[4] Dr. Marshall later reported that I had directed this vulgarity at her while on duty, which is not true.[5]

[2]JA at 141. Defendant Kleeman connected a telephone to an extension in the senior resident "call-room" which utilized the same telephone line employed in the intern "call-room", thereby permitting the senior residents to pick-up said extension telephone and eavesdrop on telephone calls taking place in the intern "call-room". The defendant admits that this mechanism was in place at all times relevant, but denies that it was used as a medium for eavesdropping.

[3]JA at 172.
[4]Ja at 179, 190.
[5]JA at 190.

Following the "beeper incident", I confronted a number of Senior Residents about the telephone setup in the intern call-room. The first several questioned refused to comment, perhaps silently admitting its occurrence.[6] Eventually however, Dr. Lisa Jenkins issued the admission upon which this appeal turns in great measure. My deposition testimony regarding this admission is as follows:

> Q: What did you say to Dr. Jenkins?
>
> A: I asked Dr. Jenkins the same thing I had asked Dr. Morris. Her response Was—
>
> Q: First of all, before you give me a response, tell me what you said to Dr. Jenkins.
>
> A: I asked Dr. Jenkins was she aware of the wiretapping and the eavesdropping, and she said that—she identified that she was aware of it; that the phone was a snoop phone and that Dr. Kleeman was the one that did the wiretapping and the residents had listened to my telephone conversations.

[6]Ja at 209-212

Q: Now, are you telling me here under oath that Dr. Jenkins specifically told you that the residents were listening to your phone conversations? Are you sure about that? Because I hadn't seen that anywhere else. Are you sure about that?

A: Yes.[7]

I also testified in my deposition that Dr. Marshall served as my Supervising Senior Resident thereafter. In the deposition, I described great acrimony which developed between Dr. Marshall and myself, which at one point led to a confrontation that began in the cafeteria and concluded in an upstairs call-room. Dr. Marshall later accused me of calling her a "lazy as bitch" during this confrontation and indicated there be witnesses—no witnesses came forth as there were not witnesses, to my knowledge listening in on the wiretapped conversation between my husband and myself except Dr. Marshall. Dr. Marshall's knowledge that I called her a "lazy as bitch" as she eavesdropped on my conversation is what spawned, in part, the taking of disciplinary actions against me. I contend that this dispute in the evidence highlights one material fact which is properly resolved at trial.

[7]JA at 213.

Dr. Marshall led a collaborative campaign of sabotage and general depredation aimed at me following the "beeper incident". I have testified and confirm that Dr. Marshall required that I perform voracious amounts of work, well over and above that generally performed by interns[8]; that I was deprived of meals[9]; that I was deliberately embarrassed and humiliated; that my social skills were misrepresented and that my medical proficiency was minimized and underscored. All this is to say, that I testified that the eavesdropping had a concrete and palpable effect on my work environment. I contend that said eavesdropping then did not occur outside the scope of employment as urged by Defendants or, at minimum, a material question of fact exists as to whether it did which is correctly resolved at trial.

REASONS FOR GRANTING THE PETITION

The opinions and Order of the District Court was improper and the 4th Circuit Court of Appeal failed to reverse the erroneous decision of the District Court.

I. The trial Court erred in holding that the Jenkins statement does not create a question of material fact as to whether or not unlawful eavesdropping occurred.

18 U.S.C. Section 2511(1)(a), in pertinent part, makes it unlawful to *inter alia* intentionally intercept or endeavor to intercept any wire communication of another. 18 U.S.C. Section 2520 creates a civil remedy, countenancing a person whose communications have been intercepted to seek relief. Here, I (plaintiff) avers that defendant MCHR, via Kleeman and Marshall among others, intercepted and/or endeavored to intercept my telephone conversations. Dr. Lisa Jenkins admitted that said Senior Residents listened (i.e., intercepted) to my phone conversations.

To complete the syllogism then, be it that my testimony is true concerning the Jenkins admission, MCHR is liable to me under the dual statues cited *supra*. The trial court erroneously dispelled these statements as inadmissible hearsay.

The trial court avoided the Jenkins admission by finding that, as a matter or law, it constituted inadmissible hearsay because it could only have been uttered outside the scope of employment as physicians are not contractually dutybound to eavesdrop. I am struck by the convenience of this postulate, as eavesdropping constitutes an illegal act that no person can be required to perform as an incident of one's employment. This singular fact distinguishes the case at bar from the opinions relied upon by the trial court. Each of these cases involved a comment on a legitimate business principle, practice or event by a person who did not hold a position of authority or responsibility with regards to the matter commented upon. Here no person can be said to be in a position of authority or responsibility with respect to the matter of eavesdropping. As such, this ruling is intricately intertwined with the *respondeat superior* analysis addressed *infra*.

Even so, while some admissions may very well be beyond the declarant's normal activities, the silent, or perhaps not so silent, ratifications of eavesdropping by Dr. Davies and others could bring the admission within the scope of employment. *See Thalhimer Bros. v. Shaw* 159 S.E. 87, 92 (Va. 1931). Moreover, Defendants may be deemed to have waived the hearsay objection by relying upon a portion of my deposition which addressed the admission.

In support of its Motion for Summary Judgment, Defendants offered page 93 of my deposition which contains the following question and answer:

> Q: That's all I want to know. So your claim of wiretapping and eavesdropping in this case is based on an allegation by you that other people were listening to your telephone calls that you were making in the intern call room—
>
> A: And based on my inquiry with Dr. Jenkins.

This statement references the admission which I later elaborated upon during the deposition. Defendants offered this portion of my deposition transcript as an exhibit to their Motion for Summary Judgment. In doing so, Defendants waived any objection of admissibility. *See Motor Club of American Ins. Co. v. Hanifi,* 145 F.3d 170 (4th Cir. 1998. As such, this admission should have been considered by the trial court.

II. This trial court improperly held that eavesdropping is outside the scope of employment.

The trial court found that Defendants' eavesdropping, if any, undoubtedly occurred outside the scope of employment. Given that the question of whether it occurred at all constitutes a material question of fact, I cannot overlook this sweeping conclusion. Logic and deduction require one to assume that the trial court must be holding that, as matter of law, eavesdropping is beyond the scope of employment. Again, this holding is convenient. It also flies in the face of a number of cases in which Marshal eavesdropping within the scope of employment, or at least did not take issue with it.[10]

[8] *See, inter alia,* Deal v. Spears, 980 F.2d 1153 (8th Cir. 1992)(employer violated statue when it used extension telephone to record employee's telephone conversations); Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983)(summary judgment reversed when supervisor used extension telephone to listen to personal telephone call of employee, violating statue);

Also, the existence of the ordinary "course of business" defense, an affirmative defense to eavesdropping, plainly suggests that eavesdropping may occur within the scope of employment, either by vessel or ratification or managerial direction. There is evidence of both in my deposition.

I testified that I reported the eavesdropping to my advisor (Dr. Nicola Davies) who discarded the eavesdropping as an "intern game". I also testified that I questioned a number of Senior Residents who refused to comment on the matter before reaching Dr. Jenkins, who admitted to the eavesdropping. In the facts that my advisor ignored my complaints and several Senior Residents, charged to supervise my daily activities, either admitted the occurrence of eavesdropping or refused to comment, this Court can find evidence of knowledge on the part of MCHR as to the evidence in question. MCHR's knowledge of said eavesdropping brings the activity within the purview of *respondeat superior*. If applied otherwise, an employer would escape liability even when it knowingly countenanced illegal conduct. This application of the *respondeat superior/* "scope of employment" theory distorts the line of reasoning which created it.

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[9] Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979) (statue violated where prison security guard used telephone extension to ,monitor inmate telephone call), (United States v. Harpel 493 F.2d 346 (10th Cir. 1974)(court specifically rejected criminal defendant's argument that use of an extension telephone does not constitute an interception of wire communication); Abel v. Bonfanti, 625 F. Supp.263(S.D.N.Y. 1985) Gerrard v. Blackman, 401 F. Supp 1189 (N.D.III. 1975).

To be sure, the trial court misapplied the Virginia cases adduced in support of its *respondeat superior* holding. The lion's share of those cases involve assaults and batteries. Indeed, the assault and battery is the classic "frolic and detour" of which the trial court's opinion speaks. The tenets embodied in those cases do not militate in favor of summary judgment in this case. Those cases could not be more factually inapposite to the present inquiry. The trial court's opinion lofts them from the well of irrelevance. Because MCHR possessed actual knowledge of the eavesdropping, and elected to ignore it, it cannot escape liability for the acts of its supervising Senior Residents.

III. In furtherance of public policy, Plaintiff (myself) urges this Court to analyze this case in accord with *Awbrey v. Great Atlantic & PC. Tea Co., Inc.* 505 F. Supp. 604 (N.D. Ga. 1980), adopting same.

I view *Awbrey* as a good model to follow and urge that the United States Supreme Court adopt its holding. *Awbrey* involved alleged repeated eavesdropping carried out against the employees of a grocery store. The defendant moved for summary judgment. It was undisputed that the alleged victims of eavesdropping possessed little or no personal knowledge of its occurrence. Rather than viewing the action through the traditional prism of summary

judgment, the Court looked upon that case with an eye towards the nature of the tort itself. In doing so, the Court recognized that the very nature of the tort at issue (wiretapping/eavesdropping) often precludes the existence of direct evidence of its occurrence, holding that the lack of evidentiary specificity in a plaintiff's allegations should not be fatal to his or her claim. The subject of a wiretapping tort very rarely possesses personal knowledge of the wiretapping. The design of wiretapping precludes it; the more successful the wiretapping, the less personal knowledge its subject will possess concerning its existence. As such, the Court afforded those plaintiffs significant evidentiary latitude when evaluating their eavesdropping claims in the context of a summary judgment motion. Id. Likewise, here I request some evidentiary breadth and equity demands it.

I discovered the eavesdropping via the fortuitous activation of Dr. Marshall's beeper, which prompted my inquiry to Dr. Jenkins. Had this not occurred, I might never have learned that I was the victim of this tort. That said, there is other circumstantial evidence in the record which supports my allegations.

I never directly called Dr. Marshall a "lazy as bitch". Rather, Dr. Marshall only heard that obscene language when I was speaking directly to my husband during a private telephone conversation.[11]

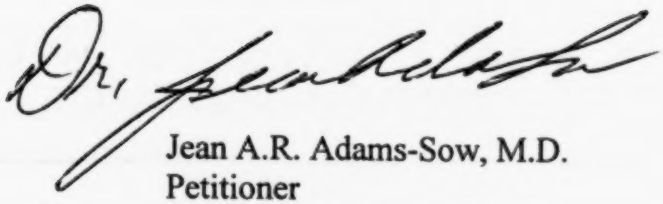
[10] I testified that I described Dr. Marshall in this vulgar manner during the same conversation in which Dr. Marshall's beeper went off.

Be it that my testimony is true, although Dr. Marshall disputes, Dr. Marshall was eavesdropping; Dr. Marshall would not have otherwise known of the vulgar reference. That is, this testimony creates a material and genuine question of fact as to whether or not I referred to Dr. Marshall as a "lazy as bitch", other than during my private telephone conversation, and , *a fortiori,* whether or not Dr. Marshall violated the statue rendering MCHR liable when coupled with its knowledge and ratification thereof. Because the credibility of a witness is an issue solely for the trier of fact to resolve, summary judgment should not have been granted. For these reasons, I urge this Court to follow *Awbrey* and allow the case to proceed given the unique nature of the statutory tort in question.

CONCLUSION

For the foregoing reasons, I respectfully request that this Court reverse the Order of the 4th District Court of Appeal and remand the case for proceedings consistent therewith.

Respectfully submitted,



Jean A.R. Adams-Sow, M.D.
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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1901

JEAN A.R. ADAMS-SOW,

Plaintiff-Appellant,

Versus

THE MEDICAL COLLEGE OF HAMPTON ROADS/EASTERN VIRGINIA MEDICAL SCHOOL; DOUG KLEEMSN, Doctor,

Defendants-Appellees,

And

OHIO STATE UNIVERSITY COLLEGE OF MEDCINE, BENJAMIN P. ENG, Doctor, JUDITH A. WESTMAN, Doctor; EDWIM E. BURKE, Doctor; TERENCE C. DAVIES, Doctor; NICOLA DAVIES, Doctor; THOMAS R. GRANT, JR., Doctor; DOCTOR PROPERT, Director,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, Senior District Judge. (CA-00-81-2)

Submitted: January 31, 2002
Decided: February 28, 2002

Before WILKINS, WILLIAM, and MICHAEL, Circuit Judges

Affirmed by unpublished per curiam opinion.

D. Hayden Fisher, SCHAFFER & CAMBELL, P.C., Richmond, Virginia, for Appellant. David E. Constine, III, Kimberly W. Daniel, TROUTMAN, SANDERS, MAYS & VALENTINE, L.L.P., Richmond, Virginia, for Appellees.

Unpublished opinion are not binding precedent in this circuit. See Local Rule 36©

PER CURIAM:

Jean A.R. Adams-Sow appeals from the district court's order granting summary judgment for Defendants on her claims under the Federal Wiretap Act provisions in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. $$ 2510-2522 (West 2000). We have reviewed the record

and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Adams-Sow v. The Medical College of Hampton Roads/Easern Virginia Med. Sch., No. CA-00-81-2 (E.D. Va. June 11, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the maqterial before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JEAN ADAMS-SOW
Plaintiff,

v. **Civil Action No. 2:00cv81**

THE MEDICAL COLLEGE OF HAMPTON\ ROADS, ETC., ET AL.,

Defendants.

OPINION & ORDER

This matter is before the Court on Defendants The Medical College of Hampton Roads/Eastern Virginia Medical School's ("MCHR") and Dr. Douglas Kleeman's ("Dr. Kleeman") (collectively, "Defendants") Motion for Summary Judgment. This Court held a hearing on Defendant's motion on April 26, 2001, and stated that a written opinion would follow to clarify that ruling. Accordingly, for the reasons set forth below, Defendants' Motion for Summary Judgment is **GRANTED.**

I. **Background**

Although Plaintiff Jean Adams-Sow's ("Adams-Sow") pro se[1] Complaint initially asserted nine claims against ten defendants, this lawsuit now consist of only a single claim against Dr. Kleeman, a former resident at MCHR, for alleged illegal wiretapping and eavesdropping and the same claim against MCHR based on the doctrine of respondeat superior. Plaintiff alleges in Count VI of her complaint that Dr. Kleeman violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. $ 2501 et seq., and 42 U.S.C. $ 1983 by illegally wiretapping a telephone she used in an intern call room at Sentara Norfolk General Hospital ("Norfolk General") and by eavesdropping upon her private conversations without her consent. Plaintiff's claim against Dr. Kleeman under $ 1983 is based on a theory that the alleged illegal wiretapping and eavesdropping constitutes a violation of the Fourth Amendment to the U.S. Constitution.[2] More specifically, plaintiff contends that Dr. Kleeman violated Title III and $ 1983 by installing an extension telephone in a resident "call room" at Norfolk General and then allegedly using the extension telephone to eavesdrop upon Plaintiff's personal telephone conversations, and that MCHR is vicariously liable for Dr. Kleeman's actions as well as the alleged eavesdropping performed by other, unidentified "senior residents.

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[1]Although Plaintiff conducted the majority of this litigation pro se, she is currently represented by Hayden Fisher, Esq.

[2]The Court previously dismissed claim against MCHR on the ground that is was not subject to vicarious liability under $ 1983. See Order of June 28. 2000.

II. Substantive Facts

During the Spring of 1997, Plaintiff accepted a position as a first-year resident, or intern, at MCHR. Consequently, during the 1997-98 academic year, Plaintiff worked as an intern in the family residency program at MCHR. See Compl. At 6.[3] During the 1997-98 academic year, Dr. Kleeman worked as a third-year resident in the family residency program at MCHR. See Defs.' Ex. B,

At all times relevant, Norfolk General provided both and intern and a resident call room for interns and residents to use while they were attending to patients or if the interns or residents were working overnight. See Defs.' Ex. D, MCHR Interrog. Response No. 3. The intern and resident call rooms were adjacent to one another. See id. In a given month, each resident on rotation at Norfolk General would spend every third or fourth night in the resident call room. See id. Approximately four or five times per month, interns would also stay overnight, working alongside a resident, as part of the educational process. See id.

When spending the night at Norfolk General, residents typically relaxed and worked in the resident call room while waiting to be paged. See id. During this time, the residents would often use the telephone or connect their computers to the telephone line in the resident call room in order to access the Internet. See id. At the start of the 1997-98 academic year, the resident call room was equipped with only one telephone and one telephone line. See id. Thus, anytime that a resident was paged, the resident was required to terminate his or her phone conversation or disconnect his or her computer in order to respond to the page via the telephone in the resident call room. See id.

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[3]Because Plaintiff pro se Complaint does not contain numbered paragraphs, citations to her Complaint herein refer to the applicable page of the Complaint.

In order to provide the residents with greater flexibility and convenience, Dr. Kleeman installed a second telephone line in the resident call room, i.e. an extension telephone, which he connected to the telephone line in the intern call room. See id. Thus, the intern's telephone line was shared with the extension telephone in the resident call room. See id. Although Plaintiff stated in her deposition that she was not aware that an extension telephone was located in the resident call room that was connected to the telephone line in the intern call room, Defendants claim that this arrangement was open, obvious, and in no way hidden from any intern or resident. See id. For purposes of this motion, however, the Court accepts Plaintiff's statement as true. With two telephones and two telephone lines available in the resident call room, residents could use one telephone for social or computer purposes, while answering pages via the other telephone. See id. In Addition, if more than one resident or both resident and an intern were in the resident call room, which had more amenities than the intern call room, then two telephones were available for use. See id.

Due to various personal matters, including the death of her father, Plaintiff took a 3-4 week absence from the residency program in September 1997 but returned to the program the following month. See Adams-Sow Dep. At 55. During October, November and a portion of December 1997 Plaintiff worked at Norfolk General as part of her residency rotation. See Defs.' Ex. C, Eng Dec., paragraph 3. Dr. Kleeman also worked as a senior resident at Norfolk General for a portion of these months. See Kleeman Dec. paragraph 2.

Plaintiff alleges that, starting in October 1997, senior residents at Norfolk General began to use the extension telephone in the resident call room to monitor her personal telephone conversations from the intern call room. See Adams-Sow Dep. At 141. Several incidents allegedly sparked Plaintiff's awareness of the perceived eavesdropping. First, while Plaintiff was on-call one night in late October 1997 and working with Dr. Sherri Marshall ("Dr. Marshall"), a second year resident, Plaintiff called her husband from the intern call room and spoke very critically of the residency program and the senior residents in particular, referring to Dr. Marshall as a "lazy ass bitch", among other things. See id. At 107, 118. Later, in the same phone call, Plaintiff allegedly heard Dr. Marshall's beeper ring, and Plaintiff realized that Dr. Marshall was eavesdropping on her conversation after Dr. Marshall picked up the phone and acknowledged that she was attempting to answer a page but had picked up the wrong phone, an act for which Dr. Marshall immediately apologized. See id. At 103-04. In addition, throughout this particular phone call, as well as Plaintiff's other phone calls from the intern call room to her husband at home, Plaintiff allegedly heard strange "clicking" sounds. Plaintiff frequently question her husband about the "clicking " noises, but Plaintiff ultimately concluded that the "clicking" was simply intrinsic to that particular telephone line. See id. at 100.

Plaintiff now asserts, however, that the "clicking" sound were Dr. Marshall or other unidentified senior residents picking up on the extension telephone in the resident call room, although at her deposition fPlaintiff could not rule out the possibility that the "clicking" noises were her children picking up various extension telephones at her house, since she was calling her husb and at home. See id. at 104. Finally, in mid-November, Dr. Marshall reported to her superiors that Plaintiff called her a "lazy-ass bitch" while the two were on duty together in early November 1997, which plaintiff denies. See id. at 118. Thus, Plaintiff contends, the only way that Dr. Marshall could have known of Plaintiff's derogatory comment was if Dr. Marshall or someone else was eavesdropping on her phone conversation.

Plaintiff allegedly questioned a number of her peers about the telephone line in the intern call room, none of whom were aware that the extension telephone in the resident call room was being used to monitor Plaintiff's personal telephone calls from the intern call room. See id at 137-40. Plaintiff continued to inquire of others about the phone, however, and Dr. Lisa Jenkins allegedly told Plaintiff that, in Plaintiff's words, "the phone was a snoop phone and that Dr. Kleeman [n] was the one that did the wiretapping and the residents had listened to [Plaintiff's] telephone conversations." Id. at 142. According to Plaintiff, Dr. Jenkins did not specify which residents were allegedly listening to her phone conversations. See id. At her deposition Plaintiff also admitted that her use of the word "wiretapping," as in "Dr. Kleeman[n] was the one that did the wiretapping", refers solely to the installation if

the extension telephone, and not the actual use of that phone to eavesdrop on Plaintiff's personal phone conversations. See id. at 91-99. More specifically, Plaintiff was asked the following questions:

Q: When you say that your calls were wiretapped, what do you mean by wiretapping?

A: Well, originally there was one phone line in the intern room, and there's one phone line in the senior resident room. They have two different telephone numbers. Now, through some means, Dr. Kleeman had made it so that when—had connected the intern call room into their room so they had two phones there. How he did it, I don't know. I don't understand how you do that.

....

Q: This is how I understand to be the [wiretapping] claim, to be basically what you just said, but I'm going to ask you the question. Is your claim that there was wiretapping occurring based on the fact that the senior resident call room had an extension telephone that was connected to the same telephone line as the intern call room?

A: Correct

Q: And that is the sole basis, just so I understand-

A: Well, the basis is hearing the clicks and sound and also hearing third-party beeper go off.

Q: I understand that, But your claim of a wiretapping device or instrumentation or something like that is only that there was an extension telephone in the senior resident call room that was connected to the same line as the intern call room; is that correct?

A: And that was not appropriate.

Q: But that's your claim; is that correct?

A: Correct.

Adams-Sow Dep. At 91-93.

Plaintiff is unaware of and has not been told of any instance in which Dr. Kleemann used the extension telephone to eavesdrop on Plaintiff's personal conversations. See id. at 91-99. And, other than the extension telephone, which Plaintiff characterizes as a "wiretapping device," Plaintiff stated in her deposition that she is not aware of any other wiretapping instrument installed by Dr. Kleemann or any other senior resident at Norfolk General. See id. at 92-95. Plaintiff also stated that she is not aware of any instance in which Dr. Kleemann used the extension telephone that was located in the resident call room, or any other device, to listen or eavesdrop on Plaintiff's telephone conversations. See id. at 98-99. Dr. Kleemann also stated in a declaration filed with Defendants' motion that he never installed a wiretapping device at the hospital, and never eavesdropped on any of Plaintiff's telephone conversations. See Kleeman Dec. paragraph 4.

Plaintiff's contract to continue in the residency program at MCHR beyond her first-year was not renewed, effective May 8, 1998. See Compl. At 2. Plaintiff feels that MCHR's decision not to renew her contract was based in part on Dr. Marshall telling Plaintiff's supervisors that Plaintiff referred to Dr. Marshall as a "lazy-ass bitch", but she places most of the blame for non-renewal of her contract on Dr. Kleeman because of a letter he wrote in December 1997 to Plaintiff's superiors in which he openly questioned Plaintiff's fitness to practice medicine. See id. 146.

Plaintiff also concedes that, in May 1998, she was "qualified" but not mentally or physically "capable of continuing her residency. See id. at 154. According to Plaintiff, "following multiple involuntary psychiatric confinements and additional treatment for emotional trauma that the event[s] generated, this lawsuit ensued." See Pl.'s Br. At 4.

III: Procedural Facts

In November 1999, Plaintiff filed the instant lawsuit, asserting that MCHR, Dr. Kleemann, four faculty physicians at MCHR, two Veterans Administration physicians, a faculty physician at the Ohio State University College of Medicine ("OSU"), and OSU engaged in unlawful conduct towards her. Plaintiff asserted nine causes of action in her Complaint: (1) a defamation claim (Count I);l (2) claims for criminal conspiracy and aiding and abetting a criminal conspiracy (Counts II and III); (3) claims under the Americans with Disabilities Act, asserting a mental handicap, an addition to illegal drugs and/or alcohol, and reading disability (Counts IV and V); (4) the wiretapping and eavesdropping claim (Count VI); (5) a claim of "involuntary brain research" and invasion of privacy (Count VII); (6) a claim that her federal constitutional rights were violated (Count VIII); and (7) a race discrimination claim under Title VII of the Civil Rights act of 1964, as amended (Count IX). On June 28, 2000, this Court dismissed all claims relating to the MCHR faculty physicians, MCHR, and Dr. Kleeman, except the claim in Count VI relating to eavesdropping and wiretapping. See Order of June 28, 2000. Plaintiff's Complaint was dismissed in its entirety as to the Veteran's Administration physicians on December 7, 2000, and as to OSU and its faculty physician on June 22, 2000.

With respect to Defendants' Motion to Dismiss Count VI, and prior to the start of discovery in this case, the Court explained that Plaintiff stated a claim against MCHR and Dr. Kleemann under Title III of the Omnibus Crime Control Act, stating: "Count VI is sufficient to put MCHR/EVMS and Dr. Kleeman on notice of plaintiff's claim, and reasonably suggest that plaintiff deemed Dr. Kleemann's alleged wiretapping to be intentional as required b y the statue." Id. at 16. The Court also held that the liability asserted against MCHR under Count VI, if any, was purely vicarious, based on the alleged unlawful acts of Dr. Kleemann: "Based on a liberal reading of plaintiff's Complaint, it appears the wiretapping of which she complains was really the act of MCHR/EVMS's employee, Dr. Kleeman, and not the act of MCHR/EVMS." Id. at 17.

Defendants filed the instant Motion for Summary Judgement against Count VI, with memorandum and exhibits in support, on March 23, 2001. Plaintiff filed her opposition to Defendants' motion on April 11, 2001, and Defendants filed their reply memorandum on April 17, 2001. Accordingly, the matter has been fully briefed and argued and is now ripe for decision.

IV. Summary Judgment Standard

Rule 56 © of the Federal Rules of Civil Procedure provides that summary judgment should be granted where "the pleadings, depositions [and]

answers to interrogatories…show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." The Supreme Court has construed Rule 56© to "mandate the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make showing sufficient to establish the existence of an essential element to that party's case, 317, 322 (1986). The Court explained that, "[I]n such situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial," Id. at 323; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). The nonmoving party must demonstrate that there are specific facts that would create a genuine issue for trial. See Anderson, 477 U.S. at 250. "where…the record taken as a whole could not lead rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." United States v. Lee, 943 F.2d 366, 368 (4th Cir. 1991).

V. Analysis

A. Overview of Title III

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the "Act") provides criminal penalties for someone who, inter alia, "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of 18 U.S.C. $ 2511. See 18 U.S.C. $ 2520. In a civil action brought under 18 U.S.C. $ 2520, an aggrieved party can obtain equitable relief, as well as actual or statutory damages, punitive damages, and attorney's fees,

The Act defines "intercept" to mean "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. $ 2510(4). "Electronic, mechanical, or other device" is, in turn, defined as

> Any device or apparatus which can be used to intercept a wire , oral, or electronic communication other than (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business…
>
> 18 U.S.C. $ 2150(a)(i).

B. **Plaintiff's Complaint**

In Count V I of her Complaint, Plaintiff charges that Dr. Kleemann and other unidentified senior residents at MCHR intentionally intercepted or endeavored to intercept Plaintiff's private telephone conversations in violation of the Act. Specifically, Plaintiff asserts that

> [s]enior residents used [the] telephone located in the Senior Residents call-room to listen in on personal telephone conversations between others and myself. Once I discovered that my telephone calls were being listened to [sic], a senior resident confessed that the wiretap[was performed by Dr. Kleeman (chief resident) as a means of listening in on 1st year resident telephone conversations. The intern call room and the Senior resident call-rooms have separate phone lines set

up in them. However, the telephone line in the intern call-room was somehow routed to the Senior Residents call-room. This way, there were two telephone lines, each with its very own telephone, located in the Senior Resident's call room. I experienced wiretapping and/or eavesdropping during the months of October and November of 1997. To my knowledge, nothing was ever done to have the wiretaps removed.

Compl. At 4.

C. **Plaintiff's Claim Against Dr. Kleeman**

To establish a claim against Dr. Kleeman under the Act or $ 1983, Plaintiff bears the burden of proving that Dr. Kleeman intentionally intercepted or endeavored to intercept Plaintiff's private telephone conversations. Defendants do no dispute that Dr. Kleemann placed a second telephone (the extension telephone) in the resident call room, and this phone was connected to the telephone line in the intern call room. Accordingly, the extension telephone in the resident call room shared a line with the telephone in the intern call room as if they were two telephones in the same home. As the undisputed evidence had made clear, however, Dr. Kleemann only installed the extension telephone for the purpose of supplying an additional line into the resident call room for answering pages. There is absolutely no evidence before the Court that Dr. Kleeman intentionally installed the extension telephone for the purpose of eavesdropping or intercepting Plaintiff's or any other intern's personal phone conversations.

Moreover, Plaintiff candidly admitted in her deposition that she was not aware of any instance in which Dr. Kleeman used the extension telephone to eavesdrop or intercept her personal phone conversations, nor has anyone else made this allegation to Plaintiff. As such, there scan be no liability against Dr. Kleeman under Count VI since Dr. Kleeman has not performed an intentional, unlawful act.

Although Plaintiff relies on Awbrey v. Great Atlantic &Pacific Tea Co., Inc., 505 F. Supp. 604 (N.D. Ga. 1980)(denying defendant/employers' motion for summary judgment in case filed by employees that alleged unlawful wiretaps were placed on phones at the employer's premises) for the proposition that the lack of specificity with respect to Plaintiff's allegations of wiretapping should not be fatal to Plaintiff's claim, the instant case is readily distinguishable from Awbrey. In Awbrey, although the plaintiffs failed to produce evidence of a single specific phone call that was overheard by means of a wiretap, the plaintiffs produced affirmative evidence that (1) wiretaps were installed on the store business phones by defendant's employees in stores where plaintiffs worked, at the time they worked; (2) that most, if not all, of the plaintiffs made personal phone calls on a daily basis from the tapped telephones during the period that the tap was in place; and (3) that at times, at least, phone calls were tapped, recorded, and replayed later on an indiscriminate basis.
See Id. at 606. Consequently, the Awbrey court denied the defendant/employer's motion for summary judgment.

In the instant case, however, Plaintiff has produced no evidence to support an intentional act of wiretapping on behalf of the Dr. Kleemann. The simple act of installing the extension telephone lines does not subject Dr. Kleeman to liability under Title III since there is not evidence that Dr. Kleeman install the extension line with the intent of eavesdropping on Plaintiff or anyone else's phone conversations, and this is the only "wiretapping device" that plaintiff complains of. Accordingly, summary judgment is **GRANTED** in favor of Dr. Kleemann as to Count VI of Plaintiff's Complaint.

D. **Plaintiff's Claim Against MCHR**

Since any liability against MCHR under Count VI must necessarily b e vicarious, the complete absence of any evidence of wrongdoing b y Dr. Kleemann precludes a finding of liability against MCHR on the basis of Dr. Kleeman. Perhaps realizing this, Plaintiff, in her opposition memorandum to the instant motion, attempt to reconstruct her claim against MCHR on the basis that MCHR is vicariously liable for the actions of other senior residents, including those not before the Court such as Dr. Marshall. Plaintiff claims that the record in this case creates a factual dispute as to whether or not Dr. Marshall and other unidentified senior residents violated the Act, and consequently, whether MCHR is vicariously liable for the alleged acts of Dr. Marshall and the other unidentified "senior residents."

Plaintiff has produced two pieces of evidence in support of her new theory against MCHR for the alleged actions of Dr. Marshall and the other, unidentified senior residents. First, Plaintiff claims to have actual knowledge that Dr. Marshall eavesdropped on her personal telephone calls on at least one instance (the time when Plaintiff told her husband that Dr. Marshall was "lazy ass bitch," and, later in the phone call, when Plaintiff overheard Dr. Marshall's beeper go off). Second, Plaintiff claims that Dr. Jenkins's statement to her that "residents had listened to [Plaintiff's] phone conversations" creates a factual dispute as to whether or not other residents aside from Dr. Kleemann eavesdropped on her phone conversations. Each allegation will be addressed in turn.

First, even assuming that Dr. Marshall did overhear a portion of Plaintiff's phone call to her husband, the evidence does not indicate that Dr. Marshall picked up the phone with the intention of eavesdropping on Plaintiff's call, or that she remained on the line after picking up the phone with the intention of eavesdropping on Plaintiff's call. Rather, the undisputed evidence indicates that Dr. Marshall picked up the phone with the intent to answer a page, and when Dr. Marshall realized that Plaintiff was already on the phone, Dr. Marshall apologized for the interruption and promptly hung up. Therefore, the undisputed evidence does not support a finding that Dr. Marshall intentionally eavesdropped or intercepted Plaintiff's phone call, and no reasonable jury could conclude as much.

Second, Plaintiff's testimony regarding the alleged statements of Dr. Jenkins is inadmissible hearsay that cannot be used as a basis for opposing Defendants' Motion for Summary Judgment. See Fed. R. Civ. P. 56 (e) (stating that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein"). Dr. Jenkins's alleged statements do not satisfy the criteria for party admissions under Rule 801 (d)(2)(D) of the Federal Rules of Evidence because illegal eavesdropping is clearly not "a matter within the scope of [Dr. Jenkins's] agency or employment." See Fed. R. Evid 801(d)(2)(D) (a statement by an employee is not hearsay, and is a party admission, only if the statement is made "by the party's agent or servant concerning a matter within the scope of the agency or employment"); see also Williams v. Pharmacia, 137 F.3d944,950-51 (7th Cir. 1998)(holding that "not everything that relates to one's job falls within the scope of one's agency or relationship" and that an employee must have responsibility for matters commented upon before statement may qualify as a vicarious admission); Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1564-66 (11th Cir. 1991)(statement of cabin steward that defendant cruise lines had been having problems with a sliding door that injured plaintiff held not to be a party admission where the steward's duties did not include the operation of the sliding doors and therefore the statement was outside the scope of the cabin steward's employment);NLRB v. Sherwood Trucking Co.775 F.2d 744, 750

(6th Cir. 1985)(statement by the defendant's employee as to reasons contractor not hired deemed inadmissible hiring the contractor). The statement attributed to Dr. Jenkins concern illegal acts allegedly committed by fellow residents that have nothing to do with Dr. Jenkins's employment duties as a MCHR resident. Although Dr. Jenkins could testify herself concerning any activities she observed, her out-of-court statements regarding these alleged events are hearsay and do not rise to the level of party admissions. Moreover, Rule 801(d)(2)(D) requires the proffering party, in this case Plaintiff, to lay a foundation to show that an otherwise excludible statement relates to a matter within the scope of the agent's employment, see Wilkinson, 920 F.2d at 1566, and Plaintiff has not laid any foundation in this case to establish that the statements of Dr. Jenkins relate to a matter within the scope of her employment. Thus, the alleged statement of Dr. Jenkins is inadmissible on this basis as well. Aside from Dr. Jenkins's alleged statement, which is not admissible, Plaintiff has produced no other evidence of intentional acts of eavesdropping by the other, unidentified senior residents that Dr. Jenkins allegedly spoke of. There is also no evidence in this case that any of the residents are even employed by MCHR, as opposed to being employees of Norfolk General, although the Court will resolve this factual inference in favor of Plaintiff for the purpose of the instant motion.

Finally, even if Plaintiff did have affirmative and admissible evidence of intentional acts of eavesdropping or wiretapping by Dr. Marshall and the other unidentified senior residents, it is axiomatic that in order for MCHR to be vicariously liable for the acts of its employees, the act or acts must have been committed in the scope of employment. Clearly, even if Plaintiff could prove that Dr. Marshall or any other senior resident committed a wrongful act in violation of the Act, such action could not be imputed to MCHR since it is not in the scope of Dr. Marshall's or any other senior resident's employment by MCHR.

Under the doctrine of respondeat superior, MCHR may be liable for the alleged tortuous acts of Dr. Marshall only if she was performing her employer's business and acting within the scope of her employment when the alleged wrongful acts were committed. See Plummer v. Center Psychiatrists, Ltd., 252 Va. 233 (1996); Kensington Assoc. v. West, 234 Va. 430 (1987). An act is within the scope of employment when:

> (1)it was expressly or impliedly directly by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business and did not arise wholly from some external, independent, and personal motive on the part of the employee to do the act upon his own account.

Kensington, 234 Va. At 432 (intentional citations and quotations omitted); see also Brittingham v. United States, 972 F. Supp. 1014, 1017 (E.D. Va. 1997). In determining whether an agent's tortuous act may be imputed to his employer, the test is not "whether the tortuous act itself is a transaction within the ordinary course of business of the master, or within the scope of the servant's authority," but " whether the service itself, in which the tortuous act was done, was within the ordinary course of the master's business or within the scope of the servant's authority." Commercial Building Systems, Inc. v. BellSouth Servs. Inc. 249 Va. 39, 44 (1995)(quoting Davis v. Merril, 133 Va. 69, 77-78 1992)).

Based on the undisputed evidence in the instant case, the Court holds as a matter of law that the alleged illegal acts of Dr. Marshall and the other unidentified senior residents were not within the scope of their employment by MCHR. The duties of Dr. Marshall and the other unidentified senior residents in the MCHR program are to provide physician services, as well as to care for and treat patients in a variety of office and hospital settings. Dr. Marshall's and the other unidentified senior residents' duties in no way involved or related to eavesdropping on other residents' or interns' phone calls. Thus, the Court finds that even if Plaintiff's allegation that Dr. Marshall as well as other unidentified senior residents intentionally eavesdropped on Plaintiff's phone conversation is taken as true, a fact that the Court find that the Plaintiff has failed to

establish, Dr. Marshall and the other unidentified senior residents were nonetheless engaged in a classic "frolic and detour" for which employers are not liable. When Dr. Marshall or the other unidentified senior residents allegedly undertook to intentionally eavesdrop \upon one of Plaintiff's personal phone calls, they "embarked upon an independent venture to satisfy [their] own personal desire" and therefore "suspend[ed] for a time the employer-employee relationship." Kensington, 234 Va. At 436. Accordingly, MCHR is not vicariously liable for the allege unlawful acts of Dr. Marshall or the other unidentified senior residents, and summary judgment is therefore **GRANTED** to MCHR on Count VI of Plaintiff's Complaint.

VI. Conclusion

For the reasons stated herein, Defendants' Motion for Summary Judgment is **GRANTED**. The Clerk is **DIRECTED** to send a cop[y of this Order via U.S. Mail to all counsel of record.

IT IS SO ORDERED.

_____
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June 8, 2001